

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Marie Doe, a minor, through her mother and  
Next Friend, Melba Doe, on behalf of herself and  
all other similarly situated,

Plaintiffs,

v.

City and County of San Francisco, *et al.*,

Defendants.

No. C04-04914 MJJ

**ORDER RE MOTION TO DISMISS,  
MOTION TO STRIKE, AND MOTION  
FOR MORE DEFINITE STATEMENT**

Pending before the Court is Defendants City and County of San Francisco, Juvenile Probation Department of the City and County of San Francisco, and Tim Diestel's: "(1) Motion to Dismiss First Amended Complaint for Failure to State a Claim; (2) Motion to Strike Certain Allegations; and (3) Motion for a More Definite Statement," (Doc. #33). Plaintiff Marie Doe, through her mother and Next Friend, Melba Doe, has filed an Opposition (Doc. #34), and Defendants have filed a Reply (Doc. #37). The Court now rules as follows.

**I. Background**

Plaintiff brings this civil rights action based on events that occurred on October 29-30, 2003, when Plaintiff was arrested and booked into jail. Plaintiff seeks declaratory and injunctive relief, as well as damages on behalf of herself and on behalf of others similarly situated. The material facts from her First Amended Complaint (Doc. #30) are summarized as follows.

At the time of the events giving rise to this lawsuit, Plaintiff was twelve years old, and attending

1 the seventh grade at Luther Burbank Middle School in San Francisco. While at school on October 21,  
2 2003, a male student kicked Plaintiff and engaged in “horseplay” with her and another female student.  
3 At some point during this interaction, the female student brought the male student to the ground and  
4 kneed him in the stomach.

5 The following week, the school reported the incident to the San Francisco Police Department.  
6 The school administration also provided statements from Plaintiff and the two other students involved  
7 in the incident to Police Officer Jacqueline Selinger, who thereafter interrogated Plaintiff and the other  
8 students. On October 29, 2003, Officer Selinger, along with Officer #1770, Officer Neil, Sergeant Lee,  
9 and Sergeant Thorne, arrested Plaintiff and the other female student for violation of California Penal  
10 Code § 245(a)(1), for “assault with a deadly weapon (feet).” Before taking Plaintiff to Juvenile Hall for  
11 processing, the Officers physically searched Plaintiff at the school. The search did not uncover any  
12 drugs, weapons, or contraband on Plaintiff’s person. Defendants did not contact Plaintiff’s mother  
13 before they interrogated, arrested, or searched Plaintiff, or before they transported her to Juvenile Hall.

14 At Juvenile Hall, Defendants booked Plaintiff into custody, took her photograph and fingerprints,  
15 ordered her to take a shower and to change into a jail uniform, and placed her in a cell. Thereafter, a  
16 Juvenile Probation Department employee interrogated Plaintiff about her sexual and menstrual history,  
17 and conducted non-consensual medical testing on Plaintiff, including taking blood and urine samples  
18 from her. That night, Plaintiff met with her mother during a supervised visitation. Later that night, a  
19 female Juvenile Probation Department employee ordered Plaintiff to disrobe to reveal her genital area,  
20 and directed Plaintiff to squat and cough. Defendants held Plaintiff overnight. The following day, on  
21 October 30, 2003, Defendants released Plaintiff to her mother. Defendants never brought charges  
22 against her.

23 On November 18, 2004, Plaintiff filed her initial Complaint against Defendants. (Doc. #1.)  
24 Defendants thereafter moved to dismiss certain claims in the Complaint. (Doc. #7.) On August 16,  
25 2005, the Court granted Defendants’ Motion in part, and denied it in part. (Doc. #29.) Specifically, the  
26 Court dismissed Plaintiff’s Count IV for violation of California Civil Code § 52.1 based on  
27 governmental immunities set forth in California Government Code §§ 844.6 and 820.02. Additionally,  
28 the Court dismissed Count V for violation of California Penal Code § 4030. Finally, the Court

1 dismissed Plaintiff's assault and battery claim in Count VI with respect to the supervisor's vicarious  
 2 liability for damages, based on the governmental immunities in §§ 820.2 and 820.8. The Court granted  
 3 Plaintiff leave to amend with respect to Counts IV and VI.

4 Plaintiff thereafter filed her First Amended Complaint for Class Action and Individual Relief  
 5 (Doc. #30), wherein she brings the following claims. In Count One, Plaintiff asserts a claim pursuant  
 6 to 42 U.S.C. § 1983 against all Defendants for violation of her rights under the Fourth and Fourteenth  
 7 Amendments, including: (a) "the right to be free from unreasonable searches and seizures"; (b) the right  
 8 to be free from invasion of privacy"; (c) "the right to be free from the deprivation of life, liberty, and  
 9 property without due process o law, including the right to be free from invasion of privacy and violation  
 10 of bodily integrity[.]" In Count Two, Plaintiff asserts a § 1983 claim against the City and County of San  
 11 Francisco, the Juvenile Probation Department, and Tim Diestel, alleging that the individual defendants  
 12 were acting pursuant to Defendants' customs, policies, practices, and/or procedures. In Count Three,  
 13 Plaintiff asserts a claim against all Defendants for violation of the California Constitution, Article 1, §§  
 14 1 and 13. In Count Four, Plaintiff asserts a claim against all Defendants for violation of California Civil  
 15 Code § 52.1, based on violations of her rights under the California and United States Constitutions and  
 16 California law. In Count Five Plaintiff asserts claim for assault and battery against Defendants City and  
 17 County of San Francisco and th Juvenile Probation Department.

## 18 **II. Legal Standards**

### 19 **A. Motion to Dismiss**

20 A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a claim. *Navarro*  
 21 *v. Block*, 250 F.3d 729, 732 (9<sup>th</sup> Cir. 2001). Because the focus of a 12(b)(6) motion is on the legal  
 22 sufficiency, rather than the substantive merits of a claim, the Court ordinarily limits its review to the face  
 23 of the complaint. *See Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9<sup>th</sup> Cir. 2002).  
 24 Generally, dismissal is proper only when the plaintiff has failed to assert a cognizable legal theory or  
 25 failed to allege sufficient facts under a cognizable legal theory. *See SmileCare Dental Group v. Delta*  
 26 *Dental Plan of Cal., Inc.*, 88 F.3d 780, 782 (9<sup>th</sup> Cir. 1996); *Balisteri v. Pacifica Police Dep't*, 901 F.2d  
 27 696, 699 (9<sup>th</sup> Cir. 1988); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530, 534 (9<sup>th</sup> Cir. 1984).  
 28 Further, dismissal is appropriate only if it appears beyond a doubt that the plaintiff can prove no set of

facts in support of a claim. *See Abramson v. Brownstein*, 897 F.2d 389, 391 (9<sup>th</sup> Cir. 1990). In considering a 12(b)(6) motion, the Court accepts the plaintiff's material allegations in the complaint as true and construes them in the light most favorable to the plaintiff. *See Shwarz v. United States*, 234 F.3d 428, 435 (9<sup>th</sup> Cir. 2000).

#### **B. Motion to Strike**

Pursuant to Rule 12(f), "Upon motion made by a party before responding to a pleading . . . the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

#### **C. Motion for a More Definite Statement**

Under Rule 12(e), "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." In filing a motion pursuant to Rule 12(e), the movant must "point out the defects complained of and the details desired."

### **III. Discussion**

#### **A. Allegations regarding violation of California Penal Code Section 4030**

As indicated above, in its prior Order, the Court granted Defendants' Motion to Dismiss Plaintiffs' Count V for violation of California Penal Code § 4030 without leave to amend. (*See Doc. #29 at 2.*) While Plaintiff's First Amended Complaint does not contain a separate claim for violation of § 4030, it includes allegations that Defendants violated § 4030 in its class allegations and in Count Four for violation of Civil Code § 52.1.

As to Plaintiff's statements in their class allegations, Defendants argue that because Plaintiff cannot maintain a claim for violation of § 4030, she cannot represent a potential class of persons who may have a § 4030 claim. With respect to Plaintiff's allegations in Count Four for violation of California Civil Code § 52.1, Defendants argue that, because the Court held that Plaintiff does not have a viable legal claim under § 4030, she cannot premise a claim pursuant to § 52.1 on a violation of 4030.

Plaintiff responds that the Court's prior dismissal of her § 4030 claims does not preclude her from bringing a claim under Civil Code § 52.1 for interference or attempted interference with her and the class of Plaintiffs' rights under California law. (*Opp. at 8-9.*) The Court, however, agrees with

Defendants.

In its prior Order, the Court dismissed Plaintiff's claim for violation of Penal Code § 4030 because it failed as a matter of law.<sup>1</sup> Plaintiff cannot attempt to revive her claim for violation of § 4030 by alleging it as a basis in support of her claim under Civil Code § 52.1. Moreover, because Plaintiff has no personal claim based on a violation of § 4030, she cannot represent a putative class of plaintiffs who may have claims for violation of § 4030. *See Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982) ("As [the Supreme Court] has repeatedly held, a class representative must be part of the class and possess the same interest and suffer the same injury as the class members.") (internal quotations omitted). The Court therefore **GRANTS** Defendants' request as follows: any allegations regarding a violation of Penal Code § 4030 shall be deemed stricken from Plaintiff's First Amended Complaint.

**B. Damages Claim Under Civil Code Section 52.1**

Next, Defendants urge the Court to strike part of paragraph 83 in Plaintiff's First Amended Complaint which, as part of her claim under Civil Code § 52.1, requests "compensatory and punitive damages and penalties." Defendants contend that the Court previously dismissed Plaintiff's claim for damages under § 52.1 based on the immunities set forth in California Government Code §§ 844.6 and 820.2, but allowed Plaintiff's claim for injunctive relief under § 52.1(b) to proceed. Defendants argue that, because Plaintiff is not entitled to damages or monetary recovery on her § 52.1 claim, this language must be stricken.

In her Opposition, Plaintiff does not address Defendants' argument regarding the availability of damages for a § 52.1 claim, but rather argues that Defendants are not shielded by governmental immunity from her 52.1 claim. The Court, however, previously considered this issue when resolving Defendants' first Motion to Dismiss, and dismissed Plaintiff's damages claim under § 52.1 based on immunities set forth in Government Code §§ 844.6 and 820.2. Plaintiff has not presented any new

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<sup>1</sup>Specifically, Plaintiff has alleged that she was arrested on an assault charge - a violent offense which is expressly excepted from Penal Code § 4030's limitations against strip searches. *See* Cal. Penal Code § 4030(f).

arguments persuading the Court to deviate from its prior ruling.<sup>2</sup> Thus, the Court **GRANTS** Defendants' request to strike Plaintiff's damages claim against the City and County of San Francisco, the Juvenile Probation Department of the City and County of San Francisco, and Tim Diestel.<sup>3</sup>

**C. Violation of the California Constitution Based on Defendants' Government Code Immunities**

In their previous Motion, Defendants moved to dismiss Plaintiff's claims under the California Constitution based on statutory immunities under Government Code §§ 844.6, 820.2, and 820.8. Defendants subsequently withdrew their immunity argument without prejudice to Defendants re-asserting it at a later time. (*See* Doc. #29 at 2.) Defendants now renew their governmental immunity defense as to Plaintiff's claims under the California Constitution in the First Amended Complaint.<sup>4</sup> Plaintiff, however, maintains that the various governmental immunity statutes are inapplicable against her claims for direct violations of the California Constitution.

The parties' discussion is primarily focused on *Fenton v. Groveland Community Services District*, 135 Cal. App. 3d 797 (Cal. Ct. App. 1982). In that case, the plaintiffs alleged that county and various county entities and employees violated their right to vote under the California Constitution. The county defendants sought to dismiss the action, relying on the governmental immunities provided in Government Code §§ 815, 818, and 820.2. The trial court sustained the county defendants' demurrer, but did not indicate which statute it found dispositive. On appeal, the court considered the county's governmental immunities argument under all three sections. As to § 815, the court noted that this section barred causes of action for damages for personal injuries. However, because the state constitutional right to vote is contained in a self-executing provision, the court held that § 815 did not bar the plaintiffs' cause of action. *Id.* at 805-06. With respect to the county's argument that § 820.2 barred the plaintiffs' suit, the court held that the county defendants had failed to establish that the actions

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<sup>2</sup>In her Opposition, Plaintiff argues that Defendants are not entitled to governmental immunity because they "violated a mandatory duty" under § 4030. However, because Plaintiff's claim for violation of § 4030 fails as a matter of law, Plaintiff's argument that Defendants violated a mandatory duty imposed by § 4030 fails, as well.

<sup>3</sup>To the extent that Plaintiff seeks injunctive relief, her claim under § 52.1(b) survives.

<sup>4</sup>Defendants do not dispute that California Government Code immunities do not apply to Plaintiff's federal law claims. (Motion at 7.)

1 underlying the plaintiffs' complaint rose to a level of policy-making, such that immunity under § 820.2  
2 for discretionary acts attached. *Id.* at 806-07. Finally, with respect to Government Code § 818, the court  
3 found that the defendants' reliance on this section only related to their motion to strike certain  
4 allegations in the plaintiffs' complaint, and not to any immunity claim. *Id.* at 807.

5 In their Motion, Defendants argue that *Fenton* supports the conclusion that liability for claims  
6 under the California Constitution is subject to Government Code immunities. Particularly, Defendants  
7 submit that the *Fenton* court's holding that § 815 did not protect a public entity from suits under the  
8 right to vote provision in the California Constitution, does not imply that other, more specific statutory  
9 immunities are also inapplicable to claims for damages under different provisions of the state  
10 constitution. Rather, Defendants advance that if the *Fenton* court believed that its ruling with respect  
11 to § 815 also foreclosed immunity under § 820.2, the court would not have addressed the defendants'  
12 § 820.2 immunity argument. Defendants thus argue that, in addressing the § 820.2 argument, the *Fenton*  
13 court impliedly recognized that if the decision at issue had been a discretionary policy decision, the  
14 defendants would have been immune from the plaintiffs' state constitutional claim. The Court disagrees  
15 with Defendants' reading of the *Fenton* decision.

16 As Defendants' note, the *Fenton* court did not address whether § 820.2 provided the county  
17 defendants with immunity because it found that the county defendants had failed, in the first instance,  
18 to establish that their conduct came within the ambit of § 820.2. Because they did not make this initial  
19 showing, the court disposed of the § 820.2 immunity argument without reaching the issue of whether  
20 it provided immunity against claims arising under the state constitution. *See Fenton*, 135 Cal. App. 3d  
21 at 806-07. Defendants' argument that, by evaluating the § 820.2 argument, the court impliedly  
22 recognized that § 820.2 could protect public entities with immunity from constitutional claims, finds no  
23 support in the decision. In fact, the court stated that because the trial court did not identify which code  
24 section provided the defendants' with immunity, it had to evaluate all three. *Id.* at 803. Thus, the  
25 significance that Defendants' attach to the appellate court's evaluation of the § 820.2 argument is  
26 undermined by this procedural backdrop. For these reasons, the Court finds that *Fenton* offers nothing  
27 to advance Defendants' immunity argument.

28 Defendants further contend that application of California Government Code immunities to state



1 constitutional damages claims is consistent with rules of statutory construction. Specifically,  
2 Defendants argue that there is no presumption that a state constitutional provision trumps a state statute,  
3 such as those contained in the Government Code. Defendants' argument, however, is unpersuasive.  
4 The question is not whether a right arising under the state constitution trumps the immunities under the  
5 Government Code, but whether the Government Code immunities extend protection beyond statutory  
6 claims against government entities to claims arising under the state constitution. Defendants have failed  
7 to identify any authority, and the Court has found none, applying the Governmental Code immunities  
8 to protect public entities from liability arising under the state constitution. Rather, the only authority  
9 that the parties have cited supports the opposite conclusion. *See Fenton*, 135 Cal. App. 3d at 805-06;  
10 *Young v. County of Marin*, 195 Cal. App. 3d 863, 869-70 & n.3 (Cal. Ct. App. 1987) (noting that  
11 Legislative Committee comment "made clear" that Government Code § 815 does not protect against  
12 constitutionally created claims). Consequently, Defendants have failed to meet their burden of  
13 establishing that they are entitled to immunity from Count Three of Plaintiff's First Amended  
14 Complaint. The Court therefore **DENIES** Defendants' Motion to Dismiss this claim.

15 **D. Plaintiff's Class Allegations**

16 Defendants contend that Plaintiff's class allegations are unclear and require additional  
17 allegations to clarify the putative classes she intends to represent. Particularly, Defendants argue that  
18 in paragraph 51(a) of the First Amended Complaint, Plaintiff alleges that, "Defendants routinely follow  
19 a custom, policy and/or practice" that includes "fail[ing] to investigate and review the basis for the arrest  
20 an proposed criminal charges against the minor to ensure that the minor is properly and legally arrested  
21 and within the custody of the Juvenile Probation Department." Defendants state that, in paragraphs 57  
22 and 58, Plaintiff describes the members of the class as including two groups, namely: (1) "all persons  
23 . . . who were arrested as minors and subjected to one of more pre-arraignment strip and/or visual body  
24 cavity searches at Juvenile Hall without legal basis"; and (2) "all persons . . . who were arrested as  
25 minors and subjected to pre-arraignment, non-consensual medical procedures, testing and/or inquiries  
26 at Juvenile Hall without legal basis[.]" Defendants argue that if Plaintiff intends to represent a class of  
27 persons who complain that they were arrested without probable cause, as suggested in paragraph 51,  
28 then Defendants "would show on subsequent motions that Juvenile Hall has no obligation under state




1 or federal law to ‘investigate and review the basis for the arrest and proposed criminal charges against  
2 the minor to ensure that the minor is properly arrested.’” Based on this argument, it does not appear that  
3 Defendants cannot ascertain the nature of Plaintiff’s allegations. Rather, Defendants dispute Plaintiff’s  
4 allegations that they violated any legal duty owed to Plaintiff or the putative class of plaintiffs. The  
5 Court therefore **DENIES** Defendants’ Motion for a More Definite Statement.

6 **IV. Conclusion**

7 For the foregoing reasons, the Court: (1) **GRANTS** Defendants’ Motion to Strike Plaintiff’s  
8 allegations regarding violations of § 4030; (2) **GRANTS** Defendants’ Motion to Strike Plaintiff’s  
9 damages claim under California Civil Code § 52.1 against the City and County of San Francisco, the  
10 Juvenile Probation Department of the City and County of San Francisco, and Tim Diestel; (3) **DENIES**  
11 Defendants’ Motion to Dismiss Count Three for Direct Violation of the California Constitution; and (4)  
12 **DENIES** Defendants’ Motion for a More Definite Statement as to Plaintiff’s class allegations.

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14 **IT IS SO ORDERED.**

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16 Dated: 11/22/2005

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19 MARTIN J. JENKINS  
20 UNITED STATES DISTRICT JUDGE  
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